

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE)
CONDITIONAL USE PERMIT GRANTED)
BY CITY OF TACOMA TO PAT LARKIN)
AND NAMES, NAMES, NAMES & LARKIN,)
AND DENIED BY WASHINGTON STATE,)
DEPARTMENT OF ECOLOGY,)

PAT LARKIN and)
NAMES, NAMES, NAMES & LARKIN,)
and CITY OF TACOMA,)

Appellants,)

v.)

STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY,)

Respondent.)

SHB No. 84-21

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the request for review of a shoreline substantial development permit and a conditional use permit came on for hearing before the Shorelines Hearings Board, Lawrence J. Faulk (presiding), Wick Dufford, Dennis Derickson, and Les Eldridge, Members, convened at Tacoma, Washington, on November 2, 1984.

1 Appellants, Pat Larkin and Names, Names, Names & Larkin, were
2 represented by their attorney, William T. Lynn. Appellant City of
3 Tacoma was not represented. Respondent Department of Ecology was
4 represented by Jay J. Manning, Assistant Attorney General. Court
5 Reporter Nancy A. Miller recorded the proceedings.

6 Witnesses were sworn and testified. Exhibits were examined. From
7 testimony heard and exhibits examined, the Board makes these

8 FINDINGS OF FACT

9 I

10 This matter arises on Ruston Way in the City of Tacoma. The area
11 is the "S-6" Shoreline District, designated "urban" by the Tacoma
12 Shoreline Master Program (TSMP).

13 II

14 The appellant, Names, Names, Names & Larkin (Names), is the owner
15 of a project on Ruston Way in Tacoma known as The Lobster Shop. The
16 project consists of an overwater restaurant constructed in 1980, and
17 an old (pre-1969) overwater two-story building which has been in the
18 past, used as a duplex. This case primarily concerns the second floor
19 of that duplex building.

20 III

21 On September 27, 1979, the Department of Ecology approved a
22 substantial development/conditional use permit issued by the City of
23 Tacoma to the former owner allowing construction of the Lobster Shop
24 Restaurant over the water on Ruston Way. The Lobster Shop is
25 immediately adjacent to the building in question, located just

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1 easterly of the small building. As part of this permit, the existing
2 structure was slightly remodeled to allow office use and storage use
3 of the building. The office use was limited to restaurant-related
4 office space. Additionally, the storage use was also limited to
5 restaurant-related storage.

6 IV

7 In March of 1981, the permits were revised. The revision allowed
8 a change in the parking/landscaping plan for the facility. More
9 importantly, for this case, the revision also allowed substantial
10 remodeling of both the interior and exterior of the two-story
11 building. No change in use, however, was allowed by the permit. The
12 use was still limited to restaurant office and restaurant storage.

13 V

14 On June 23, 1981, the City of Tacoma issued a regulatory order to
15 the former owner to halt any use of the building other than restaurant
16 offices and restaurant storage. This order was issued because it
17 became apparent that the former owner was using the second story of
18 the building for general office use. Such a use of the building
19 violated the terms of the permit.

20 VI

21 On July 1, 1981, the regulatory order was amended to give the
22 former owners an opportunity to apply for the necessary permits to
23 allow general office use of the second floor of the building.

24 VII

25 On December 30, 1981, the Department of Ecology (DOE) approved a

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1 substantial development/conditional use permit issued by the City of
2 Tacoma to the former owner to allow the upper floor of the duplex
3 building to be used for general office use. That permit was limited
4 to a period of two years from the date of approval (December 30, 1983)
5 in order to allow time for the recoupment of development expenses.

6 VIII

7 In July of 1983, appellants purchased the property and thus
8 acquired this problem.

9 IX

10 On November 16, 1983, the appellants submitted the subject
11 substantial development/conditional use permit request. Under the
12 requested permit, the upper floor would be used for general office
13 space. The lower floor would continue to be utilized as an accessory
14 restaurant office and for restaurant storage. Under the proposal,
15 public access to the shoreline would be increased by making small
16 decks on the northerly and easterly sides of the building accessible
17 to the public. The property would be improved to include a public
18 rest area and prominent signage to alert people on the adjacent
19 pedestrian/bike path to the availability of the public access.

20 X

21 On April 17, 1984, the Tacoma City Council unanimously approved
22 the permit, after receiving a recommendation for approval from the
23 hearings examiner. There was no expression of citizen or other local
24 opposition.

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XI

On May 17, 1984, the DOE disapproved the conditional use permit.

XII

On June 13, 1984, feeling aggrieved by the decision of the DOE, the appellants appealed to this Board.

XIII

The Lobster Shop complex lies within an urban area, long highly developed, once heavily industrilized, now undergoing redevelopment emphasizing restaurants, parks and public recreation. The Lobster Shop restaurant attracts over 100,000 customers annually.

XIV

The ancillary structure in question contains about 2,400 square feet of floor space. The bottom floor consists of some 1,315 square feet. The upper floor, which is the main focus of this case, consists of approximately 1,085 square feet. The restaurant building nearby contains about 7,700 square feet. The area at issue, then, consists of less than 10% of the interior square footage of the overall development.

XV

The proposed general office use of the upper floor of the former duplex and the opening to public access of areas adjacent to the lower floor, would have no adverse environmental impacts, nor would the activities interfere with navigation or be harmful to public health.

XVI

The public access changes proposed are not well-conceived as an

1 effective design for attracting public use and would not significantly
2 improve the public's opportunity to enjoy the shorelines.

3 XVII

4 Use of the upper floor of the duplex is limited because of the
5 relatively small size of the space. Its size and separation from the
6 restaurant make it impractical to incorporate into the restaurant
7 operation as a banquet area or otherwise. It is not needed for
8 restaurant-related storage or office space. It is located some
9 distance from any retail stores and, therefore, any retail business
10 use would oblige customers to make a special trip to an isolated
11 shopping location. Only a retail business with minimal space
12 requirements could be accommodated there. The upstairs location would
13 present a barrier to access by the handicapped. Moreover, the
14 experience of the past in renting this space for offices is that there
15 is no identifiable market for its use by businesses which are
16 particularly benefited by a shoreline location. In sum, no practical
17 commercial use of the space which would be facilitated by this
18 particular waterfront location is apparent.

19 XVIII

20 As far as the record shows the small floor space in
21 question--isolated on the second floor of an overwater pre-1969
22 structure, ancillary to the primary development of the site--and the
23 factors related to the practicality of its use are unique within the
24 "S-6" Shoreline District.

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XIX

The Board must decide whether the proposed use of the shoreline can be allowed as a conditional use, consistent with the Tacoma Shoreline Master Program (TSMP) and the policies of the Shoreline Management Act (SMA), embodied in RCW 90.58.020?

XX

The TSMP contains the following pertinent provisions:

a. Section 13.10.030 Definitions:

QQ. 'Water related use' means a use which is not intrinsically dependent upon a waterfront location but whose location on or near the waterfront will either facilitate its operation or will provide increased opportunity for general public use and enjoyment of shorelines and shoreline areas. Examples would include, but not be limited to the following:

. . .

2. Commercial - marine

- a. Restaurants
- b. Boat sales/supplies
- c. Fish markets
- d. Scuba, skin-diving, fishing sales/supplies
- e. Other commercial uses which provide increased opportunities for general public use and enjoyment of shorelines and shoreline areas. (Emphasis added)

b. Section 13.10.090 'S-6' Shoreline District - Ruston Way

A. INTENT. The intent of the 'S-6' Shoreline District is to encourage development of a coordinated plan of mixed public and private water-dependent and water-related use activities, including commercial,

1 recreational, and open space development; and which
2 will recognize the continued operation of
3 pre-existing uses, but which will prohibit
4 development of new residential and industrial use
5 activities.

6
7 F. SUBSTANTIAL DEVELOPMENT/CONDITIONAL USE
8 ACTIVITIES. The following use activities
9 shall be permitted subject to the issuance
10 of a Substantial Development/Conditional
11 Use Permit, provided that the applicant can
12 demonstrate that any such use activity
13 conforms with the criteria set forth in
14 Section 13.10.380 of this chapter, and
15 subject to approval of the Department of
16 Ecology as set forth in Section 13.10.180
17 of this chapter:

18
19 4. Commercial, water-related, on piers.

20 XXI

21 WAC 173-14-140(1) and (2) states:

22 (1) Uses which are classified or set forth in the
23 applicable master program as conditional uses may be
24 authorized provided the applicant can demonstrate all
25 of the following:

26 (a) That the proposed use will be consistent with
27 the policies of RCW 90.58.020 and the Policies of the
master program.

(b) That the proposed use will not interfere with
the normal public use of public shorelines.

(c) That the proposed use of the site and design of
the project will be compatible with other permitted
uses within the area.

(d) That the proposed use will cause no unreasonably
adverse effects to the shoreline environment
designation in which it is to be located.

(e) That the public interest suffers no substantial
detrimental effect.

(2) Other uses which are not classified or set forth
in the applicable master program may be authorized as
conditional uses provided the applicant can

1 demonstrate, in addition to the criteria set forth in
2 WAC 173-14-140(1) above, that extraordinary
3 circumstances preclude reasonable use of the property
in a manner consistent with the use regulations of
the master program.

4 These conditional use criteria are repeated verbatim in TSMP section
5 13.10.180.B.

6 XVII

7 Any Conclusion of Law which should be deemed a Finding of Fact is
8 hereby adopted as such.

9 From these Findings the Board comes to these

10 CONCLUSIONS OF LAW

11 I

12 The remodeled duplex, as a pre-existing structure, is authorized
13 to be maintained on the site by virtue of RCW 90.58.270. This case
14 presents a bare question of the appropriate use to be made of a part
15 of this building, located over the water in an urbanized area where
16 the natural shorelines were substantially altered years ago.

17 II

18 Since the proposed general office use is a change of use from that
19 originally permitted for this space, the decision of the City of
20 Tacoma to require a new permit was appropriate. Gislason v. Friday
21 Harbor, SHB No. 81-22 (1981). The new use is beyond the scope and
22 intent of the original permit. WAC 173-14-064(2)(d). The interim
23 permit authorizing such use for two years was not intended as a ruling
24 on the merits of the change of use question as a permanent matter.

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III

Appellants would characterize the general office use proposed as "water related" under the TSMP and, therefore, as a "listed" conditional use. They assert that this is so because the overall project is "water related," providing access through the restaurant for substantial numbers of people to enjoy the shorelines of the state.

In some contexts the Board has justified the shoreline location of uses which have no intrinsic or economic need for such siting on the basis of public access gains achieved by the project as a whole.

(E.g., Smith v. New England Fish Company, SHB 158 (1974); Allison Fairview Neighborhood Assoc. v. Seattle, SHB 205 (1976).) However, this "integrated project" theory has not been applied where the proposal is to change part of the use mix for an already completed project to an activity which by itself is clearly not water-related. (E.g., Adams v. Seattle, SHB 156 (1975).)

The Board declines to apply this approach here. General office use does not, either intrinsically or economically, require a waterfront location. We are concerned that piecemeal change to non water-related uses within projects initially authorized on the basis of a different use pattern may provide a tempting method for circumventing the siting preferences of the SMA and the master programs which implement it. We are influenced in our decision on this point here by the fact that the proposed general office use would be located over the water.

Moreover, we conclude that the additions to public access proposed

1 in connection with the requested general office use are essentially
2 cosmetic and do not support applying the "integrated project" approach
3 to this change of use application viewed in isolation from the total
4 Lobster Shop project.

5 Under the TSMP a water related use is one whose location on or
6 near the waterfront will "either facilitate its operation or will
7 provide increased opportunity for public use and enjoyment of the
8 shorelines and shoreline areas." Section 13.10.030. We conclude that
9 the applied for use of the shorelines in this case fails to satisfy
10 this definition. Therefore, the proposal is not for a "listed"
11 conditional use under TSMP Section 13.10.090, applying to the "S-6"
12 Shoreline District. It must be subjected to the additional criteria
13 for "unlisted" conditional uses.

14 IV

15 Notwithstanding the above, we are persuaded under the peculiar
16 facts, the proposed general office use in this instance meets the
17 "extraordinary circumstances" standard of TSMP 13.10.180.B.2 and WAC
18 173-14-140(2). The size, location and, to some extent, the character
19 of the space at issue are dictated by pre-SMA building decisions
20 preserved by the Act. The choice appears to be between renting this
21 small second story area for general office use and having it lie idle.

22 General office use within the "S-6" Shoreline District is not
23 prohibited. It is simply not among these use which are expressly
24 promoted by the TSMP for the area. The circumstances here preclude
25

1 any other reasonable use of the pre-SMA interior space which is the
2 subject of this application.

3 This conclusion should not be construed to mean that in another
4 case the Board will not look at the entire project complex for the
5 purposes of determining whether reasonable use of the property is
6 precluded. This decision is expressly limited to the use of a small,
7 isolated space within a pre-existing structure under the specific
8 facts presented. However, this case draws attention to the need by
9 DOE and local governments to look more closely at the problems and
10 potentials of rehabilitating older pre-SMA, urban waterfront sites and
11 structures when considering future WAC and local master program
12 revisions.

13 V

14 The proposed use meets the "ordinary" criteria for conditional
15 uses found in TSMP 13.10.B.1 and WAC 173-14-140(1). The policies of
16 the master program for the "S-6" Shoreline District, while not
17 positively advanced, are not contravened by this minimal variation
18 from the norm. Any interference with public use of the shorelines
19 presented by the structure is grandfathered under the SMA. The
20 building is compatible in design with its surroundings. The general
21 office use will not conflict with other permitted activities within
22 the area. No environmental impacts will result. No substantial
23 public interest problem has been identified.

24 VI

25 Because the factors relating to use of the space are unique, we

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1 conclude that the application cannot be reversed on the basis of
2 potential adverse cumulative impacts. TSMP 13.10.B.4; WAC
3 173-14-140(4).

4 VII

5 The proposed use is not inconsistent with RCW 90.58.020.
6 Department of Ecology v. Ballard Elks, 84 Wn.2d 551, 527 P.2d 1121
7 (1974) teaches that on urban shorelines, already extensively developed
8 in the past, decisions concerning shoreline activities may be
9 approached with a practical eye. As in Ballard Elks, we believe here
10 that to deny the proposed use would be "to ignore the realities of the
11 situation and would unduly penalize appellant without serving any
12 substantive public interest." 84 Wn.2d at 554. Accordingly, under
13 the facts, we conclude that the use authorized by the City of Tacoma
14 is a "reasonable and appropriate" use of the shorelines within the
15 policies of the SMA.

16 VIII

17 Any Finding of Fact which should be deemed a Conclusion of Law is
18 hereby adopted as such.

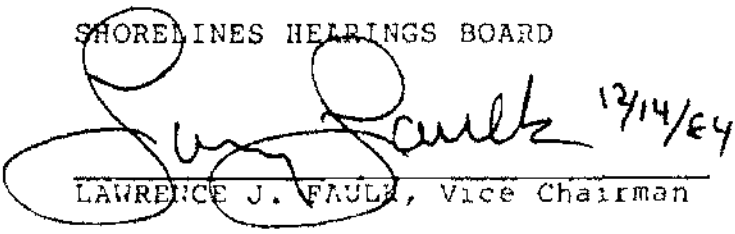
19 From these Conclusions the Board enters this
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25


ORDER

The substantial development permit and conditional use permit granted by the City of Tacoma to the appellant is affirmed.


DATED this 24th day of December, 1984.

SHORELINES HEARINGS BOARD

 12/14/84
LAWRENCE J. FAULK, Vice Chairman


WICK DUFFORD, Lawyer Member


DENNIS DERICKSON, Member


LES ELDRIDGE, Member

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